Hawaiian Custom in Hawai'i State Law

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I. Introduction

Over hundreds of years and in relative isolation, Native Hawaiians developed a complex society and subsistence economy based on their relationship with the gods and the natural world. Prior to Hawai'i's first written laws, Hawaiian custom and usage regulated Hawaiian life.[1] Thus, Hawaiian customary practices, particularly those related to land, have been recognised and incorporated into Hawai'i's statutory law since the earliest formal written laws in 1839. During the reign of Kamehameha III, the Kingdom of Hawai'i developed written laws that included protections for ancient custom and usage.[2] These laws survived political transitions and continue to apply as underlying principles of property law in Hawai'i. Of equal importance is that modern Hawaiians continue traditional practices and usage. As one scholar notes, today there are "customs and practices related to each major aspect of Hawaiian lifestyle and livelihood, including family, community life, human well-being and spirituality, natural environment, cultural and ecological resources, rights, and economics".[3]

In 1978, the Hawai'i State Constitution was amended to specifically recognise traditional and customary Hawaiian practices by adopting Article XII, Section 7:[4]

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1 John Ricord, Preface to [1846] 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 ("[1846] 1 King. Haw. Laws") (stating that "the Hawaiian kingdom was governed until the year 1838, without other system than usage, and with a few trifling exceptions, without legal enactments"), cited in Public Access Shoreline Hawaii v Hawai'i County Planning Comm'n ("PASH"), 79 Hawai'i 425, 437 n. 21, 903 P.2d 1246, 1258 n. 21 (1995), cert. denied, 517 U.S. 1163 (1996).

2 See, PASH, 79 Hawai'i, at 442-47, 903 P.2d at 1263–68 (tracing the development of private property rights in Hawai'i).

3 Davianna Pōmaika'i McGregor "An Introduction to the Hoa'āina and Their Rights" (1996) 30 Haw J of Hist 1 at 3.

4 Haw. Const. art. XII, § 7.

> **Traditional and Customary Rights**
> **Section 7.** The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

In deliberations on this provision, the constitutional framers recognised that Native Hawaiian "sustenance, religious and cultural practices ... are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems",[5] and viewed the amendment as a vehicle to "preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights".[6]

In a series of cases beginning in 1982, the Hawai'i Supreme Court has interpreted this section and other statutory provisions to allow access by Native Hawaiian cultural practitioners to undeveloped or less than fully developed lands in order to exercise traditional and customary rights. The Court has also imposed a duty on public agencies to assess and protect to the extent feasible such rights when issuing development permits. Nevertheless, many open questions remain about the reach and extent of the amendment – who can exercise these rights, on what kinds of property, what kind of state regulation is appropriate, and what are the responsibilities of government agencies in regulating development that impacts traditional and customary rights?

This paper explores the historical roots of Hawai'i's recognition of traditional and customary practices related to land and natural resources and the development of custom in modern times through Hawai'i case law. It also presents a brief overview of three other areas of law in which Native Hawaiian customs have been recognised and incorporated into State legislation. The paper concludes with an Oli Aloha or chant expressing the values of Aloha. This oli, which has been adopted into State law, seeks to encourage and infuse state actions with traditional Hawaiian concepts and values.

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5 Comm. of the Whole Debates on Hawaiian Affairs Prop. No. 12 reprinted in 2 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 426.

6 Standing Comm. Rep. No. 57 on Hawaiian Affairs Prop. No. 12 reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 640.

II. Historical Background

In Hawai'i, the transition from a land tenure system characterised by use-rights of the high chief, other chiefs, and maka'āinana[7] or common people to one of private land ownership occurred in a process called the Māhele. Māhele means division or share, and designates a series of steps undertaken by the Hawaiian Kingdom in the mid-19th century, separating out the interests of the government, king, chiefs and people in all the lands of Hawai'i.[8] Complex reasons have been given for this voluntary transformation of the land tenure system by Kamehameha III and the chiefs – among them, increasing the status of the new kingdom-state among the independent sovereign states; the fear that Hawai'i would be forcibly annexed by one of the Western powers, in which case private property rights would be recognised; pressure from Western business interests desiring to own land so that profits could be made in sugar and ranching; and the belief, expressed primarily by the Protestant missionaries, that owning land would make Native Hawaiians more industrious, give them a secure living, and bring them into the "civilised" world and thereby stem the drastic decline in the Hawaiian population.[9]

One formulation for the Māhele, as set out in the principles adopted by the Board of Commissioners to Quiet Land Titles, which had been established to settle all private claims to land existing prior to 10 December 1845, envisioned one-third of the lands going to the King, one-third to the chiefs, and the final third to native tenants.[10] Indeed, this was in keeping with Hawai'i's first constitution, the Constitution of 1840, which declared that the land and its resources were not the private property of the King but "belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of the landed property".[11]

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7 Maka'āinana means commoner, populace, people in general, and literally "people that attend the land". Mary Kawena Pukui and Samuel H. Elbert Hawaiian Dictionary (University of Hawai'i Press, Honolulu, 1986) ["Hawaiian Dictionary"].

8 For a discussion of the division of lands between Kamehameha III and the chiefs and konohiki, see Lilikalā Kame'eleihiwa Native Lands and Foreign Desires (Bishop Museum Press, Hawai'i) at 227-285. Earlier scholars set the number of ali'i receiving lands as 245; see, for instance, Marion Kelly "Land Tenure in Hawai'i" (1980, Fall-Winter) 7(2) Amerasia Journal 65 (Asian American Studies Center, University of California at Los Angeles).

9 For various perspectives on the factors leading to the Māhele, see generally, Kame'eleihiwa, above note 8, at 169-225; Robert H Stauffer Kahana: How the Land Was Lost (University of Hawai'i Press, Honolulu, 2003) at 9-76; Stuart Banner Possessing the Pacific (Harvard University Press, Cambridge, Massachusetts) at 128-162; Jon Van Dyke Who Owns the Crown Lands of Hawai'i? (University of Hawai'i Press, Honolulu, 2007) at 19-58.

10 "Principles Adopted by the Board of Commissioners to Quiet Land Titles (Aug. 20, 1846)", reprinted in Revised Laws of Hawaii of 1925 (vol 2) at 2124 ["2 Revised Laws 1925"].

11 Haw. Const. of 1840, reprinted in Lorrin A Thurston (ed) The Fundamental Law of Hawaii 3 (The *Hawaiian* Gazette Company Ltd, Honolulu, 1904).

Beginning on 27 January 1848, all lands in Hawai'i were divided between Kamehameha III and the chiefs and recorded in the Māhele Book. The King quit-claimed his interest in specific traditional land units called ahupua'a and 'ili,[12] and the chiefs quit-claimed their interests in the balance of the lands to the King. These quit-claims did not confer title, but merely acknowledged that the King had no claim to these specific lands of the chiefs and the chiefs had no claim to the King's lands.[13]

After this initial division, the chiefs or konohiki[14] were still required to go before a land commission and make claim to their lands.[15] In addition, they had to pay a commutation tax of one-third the value of the unimproved land or cede one-third of the land to the government. The konohiki were entitled to receive full allodial title to their lands in the form of royal patents. These awards specifically reserved the rights of the native tenants by including the phrase "Koe nae no kuleana o na kanaka maloko"[16] or similar wording. The konohiki received awards to lands by name only, with the ancient boundaries pertaining until a survey could be made. Subsequently, in 1862, a Boundary Commission was established to settle questions of the boundaries of the ahupua'a and 'ili awarded by name only.[17]

After the last division between Kamehameha III and the chiefs on 7 March 1848, the king held approximately 2.5 million acres or 60.3 per cent of the total land, while the chiefs had received a total approximating 1.6 million

12 An ahupua'a is a land division, usually extending from the uplands to the sea (Hawaiian Dictionary). An 'ili is a smaller land division, usually within an ahupua'a and next in importance to the ahupua'a (ibid). An early Hawai'i case explained that traditionally the ahupua'a afforded to the chief and people "a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right-of-way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top." In re Boundaries of Pulehunui, 4 Haw. 239, 241 (1879).

13 Louis Cannelora The Origin of Hawaii Land Titles and of the Rights of Native Tenants (Security Title Corporation, Honolulu, 1974) at 15; see Kanoa v Meek, 6 Haw. 63 (1871).

14 Konohiki is defined as a "headman of an ahupua'a land division under the chief" (Hawaiian Dictionary). Subsequent to the Māhele, the term was used to indicate the grantee of an ahupua'a or 'ili and the grantee's successor. Robinson v Ariyoshi, 65 Haw. 641, 670, n.26, 658 P.2d 287, 307 (1982).

15 The konohiki were given several extensions of time in which to file and prove their claims. See Act of August 10, 1854, reprinted in 2 Revised Laws 1925, above note 10, at 2147; Act of August 24, 1860, reprinted in 2 Revised Laws 1925, at 2148; and Act of December 16, 1892, reprinted in 2 Revised Laws 1925, at 2151. The last act allowed claims until 1 January 1895, after which all lands not claimed reverted to the government.

16 In Kalipi v Hawaiian Trust Co. Ltd, 66 Haw. 1, 656 P.2d 745 (1982); this phrase was translated as: "The kuleanas [sic] of the people therein are excepted."

17 Act of August 23, 1862, reprinted in 2 Revised Laws 1925.

acres.[18] The king then divided his lands into two parts. The larger portion, approximately 1.5 million acres, he "set apart forever to the chiefs and people" of the kingdom.[19] Later in the year, the legislative council ratified and accepted the lands conveyed to the chiefs and people, declaring them to be "set apart as the lands of the Hawaiian government, subject always to the rights of tenants".[20] These lands were designated as Government Lands.

Kamehameha III retained for himself, his heirs and successors the remaining lands, nearly 1 million acres.[21] These private lands became known as the King's Lands. When this action was ratified by the legislature, the King's Lands were also made subject to the rights of native tenants.[22]

Consequently, as a result of the Māhele, all lands of the king, government and chiefs were given *subject to the rights of native tenants*. It wasn't until 1850, however, that a process was established to more firmly delineate the rights of native tenants.

A. *The Kuleana Act*

The final step in the Māhele process was dividing out the interests of the maka'āinana or common people. The Kuleana Act of 6 August 1850 authorised the land commission to award fee simple title to native tenants for their plots of land.[23] Hoa'āina or tenant farmers could apply for their own plots of land or kuleana.[24] A kuleana parcel could come from lands of the king, government, or chiefs. Moreover, native tenants were not required to pay a commutation tax since the chief or konohiki of the ahupua'a or 'ili kūpono in which the kuleana was located was responsible for the commutation. Consequently, upon the death of a kuleana owner without an heir, the kuleana escheated to the owner of the ahupua'a or 'ili kūpono who had a reversionary interest as a result of paying the commutation.[25]

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18 Jon J Chinen The Great Mahele: Hawaii's Land Division of 1848 (University of Hawai'i Press, Honolulu, 1958) at 25, 31.

19 Van Dyke, above note 9, at 42, gives the following totals: the King's lands constituted 984,000 acres, the Government Lands were 1,523,000 acres, and the lands granted to the Chiefs totalled 1,619,000 acres.

20 Act of June 7, 1848, reprinted in 2 Revised Laws 1925, above note 10, at 2152-2176 (listing of lands and act ratifying division of lands).

21 See Estate of Kamehameha IV, 2 Haw. 715, 722-723 (1864).

22 Act of June 7, 1848, above note 20.

23 Act of August 6, 1850, reprinted in 2 Revised Laws 1925, above note 10, at 2141-2142 ["Kuleana Act"] — In this context, kuleana means a small piece of property (Hawaiian Dictionary).

24 Ibid.

25 Chinen, above note 18, at 30 (1958).

While kuleana lands were generally among the richest and most fertile in the islands, there were a number of restrictions placed on kuleana claims. First, kuleana could only include the land that a tenant had actually cultivated plus a houselot of not more than a quarter acre.[26] Second, the native tenant was required to pay for a survey of the land as well as bring two witnesses to testify to the tenant's right to the land.[27]

One scholar estimates that the Land Commission approved 8,421 awards, averaging less than 3 acres per award, to 29 per cent of the adult Native Hawaiian male population.[28] The original plan adopted by the king and chiefs for division of the land had stated that the maka'āinana were to receive, after the king partitioned out his personal lands, one-third of the land of Hawai'i. However, only 28,658 acres, much less than one per cent of the total land, went to the maka'āinana through this claims process.[29]

Recognising that not all natives would be able to claim kuleana, another provision of the Kuleana Act allowed natives to purchase between one and 50 acres of government lands at a minimum of 50 cents an acre.[30] One researcher estimates that the maka'āinana received another 150,000 acres through this provision of the Kuleana Act.[31] Moreover, it is generally conceded that although the maka'āinana received fewer acres, these lands were the most fertile and productive.[32]

The only section of the Kuleana Act that has survived is section 7, codified today as Hawai'i Revised Statutes ("Haw. Rev. Stat.") § 7–1:[33]

> **Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running

26 Kuleana Act, above note 23, sections 5-6.

27 Land Commission Principles, reprinted in 2 Revised Laws 1925, above note 10, at 2134.

28 Kame'eleihiwa, above note 8, at 295-297, citing Marion Kelly "Results of the Great Mahele of 1848 and the Kuleana Act of 1850" (unpublished manuscript).

29 Jon J Chinen They Cried for Help (Xlibris Corporation, 2002) at 141-142, citing the 1896 Thrum's (Hawaiian) Annual.

30 Kuleana Act, above note 23, section 4.

31 Donovan Preza, MA Candidate in Political Science, lecture to Native Hawaiian Rights Class (University of Hawai'i at Mānoa, 15 September 2008).

32 Stauffer, above note 9, at 5.

33 Haw. Rev. Stat. § 7–1 (2008).

> water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

The Kuleana Act's legislative history indicates that this section was included at the request of Kamehameha III. The Privy Council minutes show Kamehameha III's concern that "a little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value".[34] The Privy Council thus adopted the King's suggestion:[35]

> [T]he proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to[.]

The original version of this section required the tenant to seek the consent of the konohiki in exercising these rights. The consent provisions were eliminated in 1851, the legislature reciting that "many difficulties and complaints have arisen, from the bad feeling existing on account of the Konohiki's [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them".[36]

The Kuleana Act provided native tenants the right of access to their kuleana and also gave them unobstructed access within the ahupua'a to obtain items necessary for their subsistence and to make their lands productive. However, the first Hawai'i case to discuss the provision interpreted it narrowly to disallow any customary rights not specifically identified in section 7.

B. *Oni v Meek*, 2 Haw. 87 (1858)

The first Hawai'i Supreme Court case to discuss the scope of the rights under section 7 of the Kuleana Act was *Oni v Meek* (1858).[37] Oni, a tenant of the ahupua'a of Honouliuli, O'ahu, filed suit against John Meek, who had leased the entire ahupua'a from its konohiki. Oni brought suit when some of his horses, which had been pastured on Meek's land, were impounded and sold

34 3B Privy Council Record 681, 713 (1850).

35 3B Privy Council Record 681, 763 (1850).

36 Act of July 11, 1851, Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 98–99 (1851).

37 Oni v Meek, 2 Haw. 87 (1858).

by Meek. Oni claimed that he had a right to pasture his horses, presenting two legal bases for that right: (1) custom; and (2) the Act of 1846, predecessor to the Kuleana Act, which allowed a tenant the right of pasturage.[38]

The Hawai'i Supreme Court rejected both arguments. First, the Court appeared to reject the idea that any form of custom had survived the change to a fee simple land tenure system and enactment of the Kuleana Act, stating that, "the custom contended for is so unreasonable, so uncertain and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority".[39] The Court continued:[40]

> it is perfectly clear that, if the plaintiff is a hoaaina [native tenant],[41] holding his land by virtue of a fee simple award from the Land Commission, he has no pretense for claiming a right of pasturage by *custom*, for so far as that right ever was customary, it was annexed to the holding of land by a far different tenure from that by which he now holds.

The Court also concluded that while the Act of 1846 was not expressly repealed by subsequent legislation, it was implicitly repealed by the passage of the 1850 Kuleana Act.[42] The Court noted several unsuccessful attempts after 1850 to include a right of pasturage in the Kuleana Act.[43] Moreover, the Kuleana Act had been amended after 1850, but the right of pasturage had not been

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38 Ibid, at 91–92; see also Joint Resolutions on the Subject of Rights in Lands and the Leasing, Purchasing, and Dividing of the Same, § 1 (Nov. 7, 1846), 2 Haw. L. 1847, at 70, reprinted in 2 Revised Laws 1925, above note 10, at 2193. The Joint Resolutions provided, in pertinent part, that:

> The rights of the Hoaaina in the land, consists of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish to extend his cultivation on unoccupied parts, he has the right to do so. He has also rights in the grass land [sic], if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make agreements with others for the pasturage of their animals without the consent of his konohiki, and the Minister of the Interior.

Joint Resolutions, supra, cited in Oni, 2 Haw. at 91–92.

39 Ibid, at 90.

40 Ibid.

41 Hoa'āina means tenant (Hawaiian Dictionary).

42 Oni, 2 Haw. at 94 (finding that "several of the provisions of the [Kuleana Act (Aug. 6, 1850)] are clearly inconsistent with those of the [Joint Resolutions (Nov. 7, 1846)], and ... so far as this is true, the provisions of 1846 must be held, by necessary implication, to be repealed by those of 1850").

43 Ibid, at 95 (noting that "during several subsequent sessions of the Legislature, petitions were presented for the enactment of a law granting to the common people the right of pasturage on the lands of the konohikis, but without success").

included.[44] Pointing to these unsuccessful attempts to amend the enumerated rights of tenants in the Kuleana Act, the Court stated, "it was the intention of the Legislature to declare, in this enactment, all the specific rights of the hoaaina (excepting fishing rights) which should be held to prevail against the fee simple title of the konohiki".[45] Thus, *Oni* construed the Kuleana Act as the exclusive source of rights reserved to ahupua'a tenants.

For over a hundred years, the *Oni* case appeared to foreclose claims based on custom, standing for the proposition that all customary rights of native tenants had been abrogated except for those rights explicitly listed in Haw. Rev. Stat. section 7-1. In 1995, however, the Hawai'i Supreme Court, in a case discussed in detail below, explained that "*Oni* merely rejected one particular claim based upon an apparently non-traditional practice that had not achieved customary status in the area where the right was asserted."[46]

C. *Hawai'i Revised Statutes section 1–1*

The Hawaiian usage exception, set forth in Haw. Rev. Stat. § 1–1, is a second basis for customary and traditional rights:[47]

> **Common law of the State; exceptions.** The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Since section 1-1 is derived from section 5 of Act 57, approved on 25 November 1892, Hawai'i Courts have held that "Hawaiian usage" is usage that predates 25 November 1892.[48]

In *Public Access Shoreline Hawaii v Hawai'i County Planning Commission* (1995) ("*PASH*"),[49] discussed below, the Hawai'i Supreme Court concluded that section 1–1 "represents the codification of custom as it applies in our State".[50] In reviewing section 1-1, the Court noted that the

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44 Ibid.
45 Ibid.
46 PASH, 79 Hawai'i at 441, 903 P.2d, at 1262.
47 Haw. Rev. Stat. § 1–1 (2004) (emphasis added).
48 State v Zimring, 52 Haw. 472, 474-74, 479 P.2d 202, 204 (1970).
49 PASH, 79 Hawai'i 425, 903 P.2d 1246 (1995), aff'g 79 Hawai'i 246, 900 P.2d 1313 (App. 1993), cert. denied, 517 U.S. 1163 (1996).
50 Ibid, at 447, 903 P.2d at 1268.

principles codified in the statute have a much earlier origin.[51] Custom and usage governed the Kingdom almost exclusively until the promulgation of the Declaration of Rights in 1839.[52] As the government developed further, oral traditions and laws were codified in written form. The third Act of Kamehameha III created an independent Judiciary. The Judiciary was given the authority to cite and adopt:[53]

> the reasonings and analysis of the common law, and of the civil law [of other countries] ... so far as they are deemed to be founded in justice, and not in conflict with the laws and usages of this kingdom.

When the Kingdom adopted a Civil Code in 1859, section 14 included "received usage" as a source of law.[54] On 25 November 1892, the Judiciary was reorganised, repealing the relevant section in the 1859 Civil Code and adopting language similar to that found in section 1-1.[55] The original language, however, referred to the common law and Constitution of the Hawaiian Islands, "or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage". The Organic Act of 1900, which organised the territorial government under US control, made this provision applicable to the Territory of Hawai'i.[56] When the laws of the Territory were reorganised and compiled in 1905, that statute became chapter 1, section 1 of the Revised Laws of Hawai'i.[57]

III. 1978 Constitutional Amendment and Subsequent Cases

As noted above, in 1978, the Hawai'i Constitution was amended to include a provision protecting the traditional and customary rights of ahupua'a tenants. A review of the Committee Reports and Constitutional Convention debates on the amendment indicates that the provision was meant to be liberally construed and to cover the widest possible range of customary rights.[58] The debates particularly highlight the various perspectives on whether the rights to be protected by the amendment were those already established in Haw. Rev. Stats. Section 1-1 and 7-1 or whether the section granted "new" rights.

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51 Ibid, at 437, 903 P.2d at 1258, n.21.

52 See 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 (1845–1846).

53 Act of September 7, 1847, ch. I, § IV; 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 5 (1847).

54 See Civil Code ch. 3 § 14 (1859).

55 See Session Laws ch. LVII, § 5 (1892).

56 See An Act to Provide a Government for the Territory of Hawaii (Organic Act) §§ 6, 10, 32, Act of Apr. 30, 1900, c. 339, 31 Stat. 141.

57 See Revised Laws of Haw. ch. 1, § 1 (1905).

58 Standing Comm. Rep. No. 57 on Hawaiian Affairs Prop. No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 640.

Chair of the Hawaiian Affairs Committee, Delegate Frenchy De Soto, as well as Delegate Hoe, a member of the committee, stated several times that no new rights were being established.[59] Delegate Waihee made the point that the provision was a vehicle for an individual to prove the existence of traditional rights and that if the burden of proof was met, the right would then become subject to state regulation.[60] Delegate Burgess, who opposed the amendment, clearly believed that the section went beyond reaffirming existing rights and granted new rights.[61] There was overwhelming support for the amendment, which easily passed out of the convention. Although the amendment was enacted in 1978, it was not until 1982 that the Hawai'i Supreme Court decided the first case relating to the provision.

A. *Kalipi v Hawaiian Trust Co.*

In *Kalipi v Hawaiian Trust Co.* (1982),[62] its first case on Native Hawaiian gathering rights, the Hawai'i Supreme Court stated:[63]

> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail. For the Court's obligation to preserve and enforce such traditional rights is a part of our Hawaii State Constitution.

The Court continued, citing the full text of Article XII, section 7, and stating, "it is this expression of policy which must guide our determinations".[64]

In this case, William Kalipi, who owned a taro field in Manawai and an adjoining houselot in 'Ōhi'a, Moloka'i, filed suit against owners of the ahupua'a of Manawai and 'Ōhi'a when he was denied unrestricted gathering rights in those ahupua'a. Kalipi had been raised on the houselot and lived there and worked the taro field until 1975, but had since moved to Keawenui, a neighbouring ahupua'a. Kalipi sought to gather certain items for subsistence

59 Second Reading, Comm. of the Whole Rep. No. 12 on Hawn. Aff. Prop. No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 277.

60 Ibid, at 278.

61 Second Reading, Comm. of the Whole Rep. No. 12 on Hawn. Aff. Prop. No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 275.

62 66 Haw. 1, 656 P.2d 745 (1982).

63 66 Haw. 1, 4, 656 P.2d 745, 748.

64 Ibid.

and medicinal purposes, citing three sources for his claim – Haw. Rev. Stat. sections 7-1 and 1-1 and language in the original title documents of the relevant ahupua'a that reserved the people's rights.[65]

With regard to Kalipi's claims based on Haw. Rev. Stat. section 7-1,[66] which enumerates items that can be gathered within an ahupua'a by a native tenant – firewood, house-timber, aho cord, thatch, or kī-leaf,[67] the Court held that a native tenant asserting a right to gather under section 7–1 must meet three conditions: (1) the native tenant must reside within the relevant ahupua'a; (2) the right to gather must be exercised upon undeveloped lands; and (3) the right must be exercised in order to practise Hawaiian customs and traditions.[68]

Although section 7-1 did not contain an "undeveloped lands" requirement, the Court reasoned that it must be deemed a condition precedent, since gathering on developed lands would conflict with modern property law as well the "cooperation and non-interference with the well-being of other residents" that were integral parts of the traditional "Hawaiian way of life".[69] In the Court's view, only if all conditions were satisfied would a tenant have a right to gather; moreover, gathering would be restricted solely to those items expressly enumerated in the statute.[70] In an important footnote, the Court stated that the rights under section 7-1 are rights of access and collection:[71]

> They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. As such those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not prevent owners from developing lands.

Unfortunately, Kalipi did not physically reside within either the ahupua'a of Manawai or 'Ōhi'a, and thus, under the Court's formulation, could not assert rights under Haw. Rev. Stat. section 7–1.[72]

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65 Ibid, at 3-4, 656 P.2d at 747.

66 Ibid, at 4-5, 656 P.2d at 747-748.

67 Haw. Rev. Stat. § 7–1 (2004).

68 Kalipi, 66 Haw. at 7-8, 656 P.2d at 749 (stating that "[w]e believe that this balance [between customary practices and private property rights] is struck, consistent with our constitutional mandate and the language and intent of the statute, by interpreting the gathering rights of [H.R.S.] § 7–1 to assure that lawful occupants of an ahupuaa may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather those items enumerated in the statute").

69 Ibid, at 9, 656 P.2d at 750.

70 Ibid, at 7-9, 656 P.2d at 749-50.

71 Ibid, at 8, 656 P.2d at 749, n.2.

72 Ibid, at 9, 656 P.2d at 750.

In reviewing Kalipi's claims under Haw. Rev. Stat. section 1-1, the Court articulated a balancing test in which the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area and, second, by balancing the respective interests of the practitioner and harm to the landowner. The Court observed:[73]

> We perceive the Hawaiian usage exception to the adoption of the English common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. The statutory exception to the common law is thus akin to the English doctrine of custom whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law. This, however, is not to say that we find that all the requisite elements of the doctrine of custom were necessarily incorporated in § 1–1. Rather, we believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.

The Court also clarified that *Oni v Meek* rejected a particular custom – pasturage – as opposed to custom in general. The Court thus interpreted section 1-1 as "a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others".[74] Applying the balancing test, the *Kalipi* Court held that where practices associated with the Hawaiian way of life "have, without harm to anyone, been continued, ... the reference to Hawaiian usage in § 1–1 insures their continuance for so long as no actual harm is done thereby".[75]

Because there was no evidence in the record to find that gathering rights customarily extended to persons who did not reside within the ahupua'a in which the rights are asserted, and because Kalipi was not a resident of the ahupua'a, the Court held that he did not have gathering rights under Haw. Rev. Stat. section 1–1.[76]

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73 Ibid, at 10, 656 P.2d at 750-51 (citations omitted).

74 Ibid, at 1, 656 P.2d at 752.

75 Ibid, at 10, 656 P.2d at 751. The Court clearly stated that "[t]hese [practices] include the gathering of items not delineated in [H.R.S.] § 7–1 and the use of defendants' lands for spiritual and other purposes". Ibid, at 10, 656 P.2d at 751 n.4.

76 Ibid, at 12-13, 656 P.2d at 752.

Finally, with regard to Kalipi's claim under the native tenants right reservation found in the original awards of the two ahupua'a, the Court intimated that an earlier case[77] that appeared to limit such rights was not dispositive. Nevertheless, the Court concluded that as with the rights preserved by sections 7-1 or 1-1, traditional gathering rights do not accrue to persons who are not residents of the ahupua'a in which the rights are sought to be asserted.[78]

B. *Pele Defense Fund v Paty*

Ten years later, in *Pele Defense Fund v Paty* (1992),[79] the Hawai'i Supreme Court recognised that:[80]

> native Hawaiian rights protected by article XII, section 7 [of the Hawai'i Constitution] may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

In this case, Native Hawaiian residents of ahupua'a neighbouring a large tract of land, Wao Kele O Puna, on the Island of Hawai'i, based their claims on Haw. Rev. Stat. section 1-1 and Article XII, section 7. In the trial Court, they had submitted evidence to support their claims concerning the exercise of subsistence, cultural and religious practices according to ancient custom and tradition in the Wao Kele O Puna area.[81]

The Hawai'i Supreme Court explained that although the *Kalipi* case had limited gathering rights under section 7-1 to the ahupua'a in which a native tenants lives, the Court in *Kalipi* also held that section 1-1's "Hawaiian usage" clause may establish certain customary Hawaiian rights beyond those found in section 7-1.[82] The *Pele* Court also reviewed the proceedings of the 1978 Constitutional Convention, noting that the Hawaiian Affairs Committee "contemplated that some traditional rights might extend beyond the ahupua'a" and found persuasive the Hawaiian Affairs Committee's statement that the amendment should not be narrowly construed.[83] The Court concluded:[84]

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77 In Territory v Liliuokalani, 14 Haw. 88, 95 (1902), the Hawai'i Supreme Court held that "the words 'koe nae ke kuleana o na kanaka [reserving however the people's kuleana rights therein]' ... refer to the house lots and taro patches and gardens of tenants living on land within the boundaries of the larger tract granted" and did not incorporate any public right to the use of certain shoreline areas included within a grant of land.

78 Kalipi, 66 Haw. at 12; 656 P.2d at 752.

79 73 Hawai'i 578, 837 P.2d 1247 (1992), cert. denied, 507 U.S. 918 (1993).

80 Ibid, at 620, 837 P.2d at 1272.

81 Ibid, at 618, 620–21, 837 P.2d, at 1271, 1272.

82 Ibid, at 619, 837 P.2d at 1271.

83 Ibid.

84 Ibid, at 621, 837 P.2d at 1272.

> if it can be shown that Wao Kele 'O Puna was a traditional gathering area utilized by the tenants of the abutting ahupua'a, and that the other requirements of *Kalipi* are met in this case, then PDF members ... may have a right to enter the undeveloped areas of [Wao Kele O Puna] to exercise their traditional practices.

In a footnote, the Court also reiterated its earlier holding that Article XII, section 7, does not require the preservation of lands in their natural state.[85]

On remand in *Pele Defense Fund v Estate of James Campbell* (2002),[86] the trial Court ruled in favour of Pele Defense Fund, determining that customarily and traditionally exercised subsistence and cultural activities actually practised by Native Hawaiians in the Puna area prior to 1892 were not limited to one's ahupua'a of residence or by common law concepts associated with tenancy or land ownership.

C. *Public Access Shoreline Hawaii v Hawai'i County Planning Commission*

In *Public Access Shoreline Hawaii v Hawai'i County Planning Commission* (1995) ("*PASH*"),[87] Defendant Nansay Hawai'i ("Nansay") had applied for a Special Management Area (SMA) permit to develop a resort complex on the island of Hawai'i, and the shoreline organisation, Public Access Shoreline Hawai'i ("PASH"), which opposed the development, filed a request for a contested case hearing before the Hawai'i Planning Commission. The Planning Commission denied PASH's request for a hearing and issued the SMA permit and PASH filed suit. The trial Court vacated the SMA permit and directed the Planning Commission to hold a contested case hearing in which PASH would be allowed to participate. On appeal, the Hawai'i Supreme Court held that: (1) the circuit Court had jurisdiction to consider the claims; (2) PASH had standing, so a contested case hearing should be held; and, most importantly, (3) Native Hawaiians retain rights to pursue traditional and customary activities, since land patents in Hawai'i confirm only a limited property interest when compared with Western land patents/concepts of property.

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85 Ibid, at 621, 837 P.2d at 1272, n.36.

86 Pele Defense Fund v Paty, No. 89–089 Haw. 3d Cir. Aug. 26, 2002 (Findings of Fact, Conclusions of Law, and Order) (on file with author).

87 PASH, 79 Hawai'i at 429, 903 P.2d at 1250.

Nansay Hawaii did not contest PASH's claims on the exercise of traditional native Hawaiian gathering rights, including gathering for food and fishing for 'ōpae, or shrimp,[88] but argued that "[w]hen the owner develops land, the gathering rights disappear".[89] The Court rejected this argument, holding that the State is obligated to protect the reasonable exercise of traditional and customary rights to the extent feasible.[90] The Court's opinion traced the origins of Haw. Rev. Stat. section 1–1 back to the third Act of Kamehameha III[91] authorising the adoption of common law principles, provided they were "not in conflict with the laws and usages of this kingdom".[92] The *PASH* Court further stressed that "the precise nature and scope of the rights retained by [Haw. Rev. Stat.] § 1–1 … depend upon the particular circumstances of each case".[93]

The Court devoted considerable attention to the extent that Haw. Rev. Stat. section 1-1 preserved customary practices, noting that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under section 1-1. The Court also distinguished the doctrine of custom in Hawai'i in several ways. First, contrary to the "time immemorial" standard used by English and American common law, traditional and customary practices in Hawai'i must be established in practice by 25 November 1892.[94] Second, continuous exercise of the right is not required, although the custom may become more difficult to prove.[95] The *PASH* Court stated, "[t]he right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site".[96]

The Court set out a test for the doctrine of custom, requiring that a custom be *consistent when measured against other customs*;[97] a practice be *certain in an objective sense*, "[A] particular custom is certain if it is objectively defined and applied; certainty is not subjectively determined";[98] and a traditional

88 Ibid, at 430, 903 P.2d at 1251 n.6 (noting that Nansay "did not directly dispute the assertion that unnamed members of PASH possess traditional native Hawaiian gathering rights at Kohanaiki, including food gathering and fishing for 'ōpae, or shrimp, which are harvested from the anchialline ponds located on Nansay's proposed development site").

89 Second Supplemental Brief (Opening Brief) for Petitioner-Appellee-Appellant Nansay Hawaii at 19, PASH, 79 Hawai'i 425, 903 P.2d 1246 (1995).

90 PASH, 79 Hawai'i at 451, 903 P.2d at 1272.

91 Ibid, at 437, 903 P.2d at 1258 n.21.

92 Ibid.

93 Ibid, at 438, 440, 903 P.2d at 1259, 1261.

94 Ibid, at 447, 903 P.2d at 1268.

95 Ibid, at 441, 903 P.2d at1262 n.26 (citation omitted).

96 Ibid, at 450, 903 P.2d at 1271.

97 Ibid, at 447, 903 P.2d at 1268 (internal quotation marks omitted).

98 Ibid (internal quotation marks omitted).

use be *exercised in a reasonable manner*.[99] Defining the reasonable use requirement, the Court further explained that the balance leans in favour of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it".[100]

The Court also held that the State has the authority to reconcile competing interests;[101] thus, "[d]epending on the circumstances of each case, once land has reached the point of 'full development' it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property".[102] The *PASH* Court, however, clearly stated that:[103]

> [a]lthough access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 [of the Hawai'i Constitution] does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the[se] rights ... out of existence.

The *PASH* Court also clarified that:[104]

> those persons who are "descendants of native Hawaiians who inhabited the islands prior to 1778," and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1–1, are entitled to protection regardless of their blood quantum.

The *PASH* Court, however, declined to decide whether descendants of non-Hawaiian citizens of the Hawaiian Kingdom are entitled to such protection and expressly reserved comment on the question whether non-Hawaiian members of an 'ohana may "legitimately claim rights protected by article XII, section 7 of the state constitution and H.R.S. § 1–1".[105]

While recognising that "the western concept of exclusivity is not universally applicable in Hawai'i", the Court addressed concerns that the ruling could theoretically lead to disruption by relying on non-confrontational aspects of traditional Hawaiian culture, which should "minimize potential disturbances". The Court also pointed out that "the State retains the ability to reconcile competing interests under article XII, section 7".[106] The State's regulatory

99 Ibid, at 447, 903 P.2d at 1268 (citation and internal quotation marks omitted).

100 Ibid (citation and internal quotation marks omitted).

101 Ibid.

102 Ibid, at 451, 903 P.2d at 1272 (emphasis added).

103 Ibid (emphasis added); see also ibid at 441, 903 P.2d at 1262 n.26 (stating that one of the requirements for custom is that the use or right at issue is "obligatory or compulsory (when established)").

104 Ibid, at 449, 903 P.2d at 1270.

105 Ibid, at 449, 903 P.2d at 1270 n.41. 'Ohana is a family or kin group (Hawaiian Dictionary).

106 Ibid, at 447, 903 P.2d at 1268.

authority does not provide it with "the unfettered discretion to regulate the rights of ahupua'a tenants out of existence".[107] However, the State is authorised to permit private property owners to exclude persons "pursuing non-traditional practices or exercising otherwise valid customary rights in an *unreasonable* manner".[108]

The Hawai'i Supreme Court's guidance in *PASH* was never applied in that case; the landowner withdrew its permit application and the proceedings were terminated.[109]

D. *State v Hanapi*

In a criminal case, *State v Hanapi* (1998),[110] the Hawai'i Supreme Court held that "it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected".[111] The defendant, Alapa'i Hanapī, lived in the ahupua'a of 'Aha'ino on the island of Moloka'i, on property adjoining the two fishponds, Kihaloko and Waihilahila.[112] The owner of land next to Hanapī's property had graded and filled the area near the ponds in apparent violation of US Army Corps of Engineers wetland regulations. The landowner thus conducted a voluntary, unsupervised restoration of the area, with the advice and oversight of a consultant archaeologist.

Hanapī saw the landowner's actions as a "desecration of [a] traditional ancestral cultural site",[113] and felt that it was his obligation as a Native Hawaiian tenant to perform religious and traditional ceremonies to heal the land.[114] Thus, Hanapī twice entered the property to observe and monitor the restoration.[115] On a third visit, Hanapī was ordered off the property; Hanapī refused and was arrested and charged with second-degree criminal trespass.

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107 Ibid, at 451, 903 P.2d at 1272; see also ibid at 442, 903 P.2d at 1263 ("[T]he regulatory power provided in article XII, section 7 does not justify summary extinguishment of such [traditional and customary] rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property'.").

108 Ibid at 442, 903 P.2d at 1263 (emphasis added).

109 Hugh Clark "Builder Withdraws its Kona Resort Application" Honolulu Advertiser (Hawai'i, 2 August 1996) at A5.

110 89 Hawai'i 177, 970 P.2d 485 (1998), recons. denied, 1999 Haw. LEXIS 34 (Haw. Feb. 8, 1999).

111 Ibid, at 184, 970 P.2d at 492.

112 Ibid, at 178, 970 P.2d at 486.

113 Ibid.

114 Ibid, at 181, 970 P.2d at 489.

115 Ibid, at 178, 970 P.2d at 486.

At trial, Hanapī represented himself. The trial Court repeatedly sustained the prosecution's objections as Hanapī asserted a defence of privilege based upon his constitutional rights as a Native Hawaiian.[116] Hanapī persisted and was able to elicit some testimony in support of his defence.[117] Ultimately, Hanapī was convicted of the criminal trespass charge.[118] On appeal, the Hawai'i Supreme Court concluded that the district Court's errors were harmless; Hanapī's conviction was affirmed.[119] The Court stated, however, that "constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes".[120] The Court then set forth three minimum requirements that must be met for a defendant to successfully assert a defence based on a constitutionally protected Native Hawaiian traditional and customary right:[121]

First, a defendant must qualify as a "native Hawaiian", regardless of blood quantum, as defined in *PASH* – a descendant of the inhabitants of the Hawaiian islands prior to 1778.[122]

Second, a defendant must "establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice".[123] The Court also stated that in order to establish the existence of a traditional or customary Native Hawaiian practice, there must be an "adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice".[124] Such a foundation can be made through the testimony of kama'āina witnesses or experts as proof of Hawaiian custom and usage.[125]

116 Ibid, at 179-181, 970 P.2d at 487-89.
117 Ibid, at 185, 970 P.2d at 493.
118 Ibid, at 181, 970 P.2d at 489.
119 Ibid, at 185, 188, 970 P.2d at 493, 496.
120 Ibid, at 184, 940 P.2d at 492.
121 Ibid, at 185-86, 970 P.2d at 493-94.
122 Ibid, at 186, 970 P.2d at 494.
123 Ibid, at 186, 970 P.2d at 494. The Court noted that, although some customary and traditional native Hawaiian rights are codified in the Hawai'i Constitution, article XII, section 7, or in H.R.S. sections 1–1 and 7–1, "[t]he fact that the claimed right is not specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed". Ibid (citing PASH, 79 Hawai'i at 438, 903 P.2d at 1259).
124 Ibid, at 187, 970 P.2d at 495.
125 Ibid. A kama'āina literally means "land child" and is one who is native-born and familiar with a particular place (Hawaiian Dictionary).

Finally, a defendant must show that "the exercise of the right occurred on undeveloped or less than fully developed property".[126] In clarifying and perhaps limiting *PASH*, the Court held that on property deemed "fully developed", which it characterised as property zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always "inconsistent" to permit the practice of traditional and customary rights.[127] The Court, however, also reserved the question of the status of Native Hawaiian traditional and customary rights on property that is "less than fully developed".[128]

E. *Ka Pa'akai O Ka 'Aina v Land Use Comm'n.*

In *Ka Pa'akai O Ka 'Aina v Land Use Commission* (2000),[129] the Hawai'i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests".[130] This case arose from the reclassification of nearly 1,010 acres of land in the Ka'ūpūlehu ahupua'a on the island of Hawai'i from conservation to urban use by the State Land Use Commission ("LUC") upon application by defendant Ka'upulehu Developments. Ka'upulehu Developments sought to develop a luxury subdivision with upscale homes, a golf course and other amenities. Plaintiffs argued that their Native Hawaiian members' customary and traditional gathering rights would be adversely affected by the proposed development.[131]

The Hawai'i Supreme Court held that the LUC improperly delegated its obligations under Article XII, section 7, to the developer by placing a condition in the order granting reclassification requiring the developer to "preserve and protect any gathering and access rights of native Hawaiians".[132] The Court stated that the wholesale delegation of responsibility for the preservation and protection of such rights to the developer "was improper and misses the point. These issues must be addressed before the land is reclassified".[133]

The Court also held that:[134]

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126 Ibid, at 187, 970 P.2d at 495 (citing PASH, 79 Hawai'i at 450, 903 P.2d at 1271).
127 Ibid, at 186-87 and n.10, 970 P.2d at 494-95, n.10.
128 Ibid, at 187, 970 P.2d at 495 (citing PASH, 79 Hawai'i at 450, 903 P.2d at 1271).
129 94 Hawai'i 31, 7 P.3d 1068 (2000).
130 Ibid, at 46-47, 7 P.3d at 1083-84.
131 Ibid, at 34-36, 7 P.3d at 1071-73.
132 Ibid, at 50, 7 P.3d at 1087.
133 Ibid.
134 Ibid, at 35, 7 P.3d at 1072.

> the [LUC's] findings of fact and conclusions of law are insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians[;] [t]he LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.

The Court held that the LUC "must – at a minimum – make specific findings and conclusions" regarding:[135]

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
>
> (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
>
> (3) the feasible action, if any, to be taken by the [LUC] to reasonably protect native Hawaiian rights if they are found to exist.

F. *In re Waiola o Molokai*

In a water case from the island of Moloka'i, *In re Waiola o Molokai* (2004),[136] the Hawai'i Supreme Court applied the analytical framework set out in *Ka Pa'akai*. In reviewing a decision by the State Commission on Water Resource Management (COWRM), the Court utilised *Ka Pa'akai*'s guidelines to find that COWRM had not met "its public trust obligation to protect native Hawaiians' traditional and customary gathering rights",[137] by granting a water use and well construction permit, without adequately protecting the natural resources that are customarily and traditionally gathered. The Court stated:[138]

> A substantial population of native Hawaiians on Moloka'i engages in subsistence living by fishing, diving, hunting, and gathering land and marine flora and fauna to provide food for their families. Aside from the nutritional and affordable diet, subsistence living is essential to (1) maintaining native Hawaiians' religious and spiritual relationship to the land and nearshore environment and (2) perpetuating their commitment to "malama ka aina," which mandates the protection of their natural ecosystems from desecration and deprivation of their natural freshwater resources.

135 Ibid, at 47, 7 P.3d at 1084.
136 103 Hawai'i 401, 83 P.3d 664 (2004).
137 Ibid, at 443, 83 P.3d at 706.
138 Ibid, at 439, 83 P.3d at 702.

The Court found that, like the Land Use Commission in *Ka Pa'akai*, COWRM "lacked an adequate evidentiary basis for its conclusion that [the developer's] 'applied-for uses ... do not abridge or deny traditional or customary Hawaiian rights, customs, practices, or appurtenant water rights, or any other rights referred to in or protected by [Hawai'i law]'".[139] Thus, the Court vacated the decision, holding that COWRM failed to place adequate conditions on the permitted use in order to protect the natural resources that were the basis of Native Hawaiian customary and traditional fishing and ocean gathering practices.[140]

G. *In re Kukui (Molokai) Inc.*

In a more recent case, the Hawai'i Supreme Court again reviewed a COWRM decision, this time approving a permit authorizing the use of over 1 million gallons of water per day from Well-17 on Moloka'i. The Court determined, *inter alia*, that COWRM erred because it "impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice".[141] The Court concluded that COWRM failed to adhere to the proper burden of proof standard to maintain the protection of Native Hawaiian traditional and customary gathering rights in discharging its public trust obligation.[142]

IV. Judicially Defined Criteria for Customary and Traditional Practices

A. *Balancing the Interests of Property Owners and Practitioners*

In reviewing customary rights claims, the Hawai'i Supreme Court has articulated a balancing test in which the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area and, second, by balancing the respective interests of the practitioner and possible harm to the landowner.[143]

In *Kalipi*, the Court did not need to implement this balancing test since it found that there was insufficient evidence to show that such rights should accrue to someone who did not reside in the ahupua'a in which such rights are claimed. The Court also noted, however, that testimony had shown that

139 Ibid, at 443, 83 P.3d at 706 (quoting Conclusion of Law No. 29 entered by the State Commission on Water Resource Management in the contested case hearing decision that formed the basis for this appeal).

140 Ibid.

141 *116 Hawai'i 481, 507, 174 P.3d 320, 346* (2007).

142 Ibid, at 509, 174 P.3d at 348.

143 Kalipi, 66 Haw. at 10, 656 P.2d at 750-51 (citations omitted).

there was a range of traditional practices – including the gathering of items not included in Haw. Rev. Stat. section 7-1 and use of lands for spiritual and other purposes – that required the use of undeveloped property of others. The Court then concluded that where such practices, "*without harm to anyone*", have continued, section 1-1 ensures their continuance "so long as *no actual harm* is done thereby".[144] Thus, for the *Kalipi* Court, the balancing test focused on whether the customary practice harmed another's interest.

In *Pele*, the Court characterised *Kalipi* as upholding rights under Haw. Rev. Stat. section 1-1 to:[145]

> enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes *so long as no actual harm* was done by the practice.

Subsequently, in *PASH*, the Court amplified on the test, stating that the "*reasonable exercise* of ancient Hawaiian usage is entitled to protection under article XII, section 7", although:[146]

> the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner.*

Similarly, when the *PASH* Court reached its landmark conclusion that "the western concept of exclusivity is not universally applicable in Hawai'i",[147] it immediately attempted to alleviate fears of private property owners by stressing "the non-confrontational aspects of traditional Hawaiian culture" which "should minimize potential disturbances".[148] The Court then emphasised that "unreasonable or non-traditional uses are not permitted under today's ruling".[149]

Consequently, in balancing the interests of practitioners and private property owners, the Court has focused on (1) whether the practice is indeed customary and traditional; (2) whether the practice is exercised in a reasonable manner; and (3) whether the practice causes harm to another's recognised interest. The question of harm to another's interest is closely related to whether a customary practice is exercised in a reasonable manner.

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144 Ibid, at 10, 656 P.2d at 750 (emphasis added).
145 Pele, 73 Haw. at 618, 837 P.2d at 1270 (emphasis added).
146 PASH, 79 Hawai'i at 442, 903 P.2d at 1263 (emphasis added).
147 Ibid.
148 Ibid, at 447, 903 P.2d at 1268.
149 Ibid.

In a footnote in *PASH*, the Court highlighted three aspects of the doctrine of custom in Hawai'i: (1) a custom is *consistent* when measured against other customs; (2) a custom is *certain* if it can be objectively defined and applied; and (3) *reasonableness* concerns the manner in which an otherwise valid customary right is exercised – "even if an acceptable rationale cannot be assigned, the custom is still recognised as long as there is no 'good legal reason' against it."[150] Thus, the reasonableness of the manner or method employed in the exercise of a valid practice determines whether it warrants constitutional protection, but the balance tips toward reasonableness as long as there is no good legal reason against recognising the custom.[151]

B. *Practice Established by 25 November 1892*

Based on the enactment of Haw. Rev. Stat. section 1-1, traditional and customary practices in Hawai'i must be established in practice by 25 November 1892.[152]

C. *Customary Rights not Limited by Tenancy*

Although *Kalipi* appeared to hold that customary and traditional rights were associated with residency within the ahupua'a, *Pele* clarified that Article XII, section 7, protects customary rights exercised beyond the boundaries of the ahupua'a in which a Native Hawaiian resides where those rights were customarily and traditionally exercised in that manner.[153] In *PASH*, the Court reaffirmed its holding in *Pele* and declared that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state".[154]

D. *Definition of Native Hawaiian*

In *PASH*, the Court rejected an interpretation of *Pele* that would have limited protection under Article XII, section 7, to those Native Hawaiians of 50 per cent or more Hawaiian ancestry. The *PASH* Court held that descendants of Native Hawaiians who inhabited the islands prior to 1778 who assert valid customary and traditional Hawaiian rights are entitled to protection, regardless of their blood quantum.[155]

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150 Ibid, at 447, 903 P.2d at 1269 n.39.

151 See D Kapua'ala Sproat "Comment: The Backlash against PASH: Legislative Attempts to Restrict Native Hawaiian Rights" (1998 Summer/Fall) 20 U Haw L Rev 321 at 342.

152 PASH, 79 Hawai'i at 447, 903 P.2d at 1268.

153 Pele, 73 Haw. at 620, 837 P.2d at 1272.

154 PASH, 79 Hawai'i at 448, 903 P.2d at 1269.

155 Ibid, at 449, 903 P.2d at 1270.

E. *Continued Existence of a Customary Practice*

Both *Kalipi* and *Pele* implied that a customary practice, in order to be valid, must have been exercised continuously.[156] Moreover, in the earlier case of *State v Zimring*,[157] the Court seemed to reject the idea that customary practices had carried over into a private property regime. *PASH* characterised the relevant language in *Zimring* as dicta and specifically stated that the "ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights" and that "fee simple title in Hawai'i is limited by the sovereign's authority to regulate its use".[158] This analysis led the Court to conclude that that the "right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site".[159]

F. *Undeveloped/Fully Developed Land*

In the *Kalipi* case, the Hawai'i Supreme Court imposed a restriction on the exercise of traditional and customary under Haw. Rev. Stat. section 7-1, determining that such practices could only be exercised on "undeveloped lands within the ahupua'a".[160] The Court acknowledged that the undeveloped land limitation "is not, of course, found within [Haw. Rev. Stat. 7-1]".[161] The Court added the restriction to avoid conflicts between practitioners and landowners and characterised it as necessary to prevent residents from going "anywhere within the ahupua'a, including fully developed property, to gather the enumerated items".[162] Such a result, the Court said, "would so conflict with understandings of property, and potentially lead to such disruption" that it would be absurd and therefore not what was intended by the statute's framers.[163] The *Kalipi* Court also expressed its opinion that such a result would conflict with the "traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture".[164]

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156 Kalipi, 66 Haw. at 11-12, 656 P.2d at 751-52; Pele, 73 Haw. at 619, 837 P.2d at 1271.

157 State v Zimring, 58 Haw. 106, 566 P.2d 725 (1977). In Zimring, the Court determined that lava extensions are owned by the State and rejected the trial Court's determination that Hawaiian usage was always to give lava-extended shorelines to the abutting landowner. In doing so, the Zimring Court questioned the relevance of customary usage prior to institution of a fee simple land ownership system in Hawai'i.

158 PASH, 79 Hawai'i at 449-450, 903 P.2d at 1270-71.

159 Ibid, at 45, 903 P.2d at 1271.

160 Kalipi, 66 Haw. at 7, 656 P.2d at 749.

161 Ibid, at 8, 656 P.2d at 750.

162 Ibid.

163 Ibid.

164 Ibid.

In *Pele*, the Court did not specifically comment on this requirement, but implicitly applied it to customary practices recognised under Haw. Rev. Stat. section 1-1.[165] However, in *PASH,* the Court declined the "temptation to place undue emphasis on non-Hawaiian principles of land ownership" and elected "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed'".[166] Instead, the Court emphasised the need to make determinations on a case-by-case basis. However, the *PASH* Court also stated that, "once land has reached the point of 'full development' it may be inconsistent"[167] to allow the exercise of Native Hawaiian rights. On its face, this language indicated that there could be instances in which fully developed land might be subject to the exercise of Native Hawaiian customary and traditional rights.

Subsequently, the Court clarified this statement. In the *Hanapi* case, the Court held that:[168]

> if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is *always* "inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property.

In a footnote, the Court acknowledged that residential property is only one example of fully developed property and that there may be other such examples.[169] In accordance with the holding in *PASH,* however, the Court reserved the question as to the status of Native Hawaiian rights on property that is "less than fully developed".[170]

G. *Establishing Customary and Traditional Practices*

Of the cases decided by the Hawai'i Supreme Court, only *Hanapi* offers concrete guidance on what is required to establish a customary and traditional practice. In *Hanapi*, the Court first noted that some customary and traditional native Hawaiian rights are codified either in Article XII, section 7, of the State

165 See Pele, 73 Haw. at 621, 837 P.2d at 1273, stating that upon a showing that Wao Kele O Puna was a traditional gathering area utilised by tenants of the abutting ahupua'a, PDF members may have a right to enter the undeveloped areas to exercise their traditional practices. PDF based its customary and traditional rights claim on Haw. Rev. Stat. § 1–1 and Art. XII, § 7 of the Hawai'i Constitution. Ibid, at 618, 837 P.2d at 1270.

166 PASH, 79 Hawai'i at 450, 903 P.2d at 1271.

167 Ibid.

168 Hanapi, 89 Hawai'i at 186-87, 970 P.2d at 494-95.

169 Ibid, at 187, 970 P.2d at 495, n. 10.

170 Ibid, at 187, 970 P.2d at 495.

constitution or in Haw. Rev. Stat. sections 1-1 and 7-1.[171] The Court stated, however, "The fact that the claimed right is not specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed."[172]

In *Hanapi*, the defendant, although testifying to his own practice and the basis for the practice, did not offer an explanation of the "history or origin of the claimed right. Nor was there a description of the 'ceremonies' involved in the healing process."[173] The Court in *Hanapi* believed that the defendants' testimony and the testimony of his wife, standing alone, were insufficient to meet the burden of proving a customary and traditional right. The Court stated that to establish the existence of a traditional or customary Native Hawaiian practice, there must be an "adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice".[174] According to the Court, such a foundation can be made through testimony of experts or kama'āina witnesses as proof of ancient Hawaiian tradition, custom and usage.[175]

What is less clear is to what extent Native Hawaiian practitioners can use modern means and methods – for instance a motorboat for fishing or a chainsaw to fell a tree – to exercise customary and traditional rights. Although the Hawai'i Supreme Court has never been called upon to decide these kinds of issues,[176] federal Court cases interpreting American Indian treaty rights may provide some guidance. Several federal Court decisions appear to support the use of modern technology while native peoples are engaged in traditional and customary practices. These decisions affirmed the right of tribes to employ

171 Ibid, at 186, 970 P.2d at 494. Notwithstanding the Court's statement, arguably only Haw. Rev. Stat. § 7–1 actually enumerates customary and traditional rights.

172 Ibid, at 186, 970 P.2d at 494.

173 Ibid, at 187, 970 P.2d at 495.

174 Ibid.

175 Ibid, at n.12.

176 One state trial Court judge determined, with respect to a claim of customary and traditional fishing rights, that:

> Method is relevant to claimed traditional and customary rights. Fishing and gathering lose their traditional and customary nature when performed with modern technology that: (a) substantially replaces human dexterity, energy or propulsion (e.g. manual harvesting, hand retrieval of lines and nets, swimming, rowing) or natural energy or propulsion (e.g. surfing, sailing) with engines or motors; or (b) replaces and substantially extends the scope or intensity of traditional methods (e.g. miles long synthetic lines vs. traditionally made lines). A difference in amount can be a difference in kind.

Kelly v 1250 Oceanside Partners (Civ. No. 00-1-0192K, Findings of Fact; Conclusions of Law and Order With Respect to Counts II and V in the Fifth Amended Complaint, October 21, 2002), Conclusion of Law No. 4.

modern boats, nets and other techniques while exercising their treaty fishing rights.[177] For example, *United States v Washington*[178] discussed the fact that the treaty tribes utilise modern techniques to fish and some, such as the Makah, even desired assurances in negotiating their treaties that they would not be bound to aboriginal techniques and methods in fishing. Ultimately, the Court determined that the "treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource".[179]

Similarly, there are federal statutes, including the Marine Mammal Protection Act of 1972,[180] which provide specific exemptions for Alaska Natives, allowing them to take protected marine mammals such as seals, whales, and sea otters for subsistence or for use in traditional native handicrafts. These statutes as well as cases interpreting them may provide some guidance on this issue.[181] The answer, however, is likely to lie in a case-by-case determination by Hawai'i Courts as to whether the particular means or method employed is reasonable and whether its use is harmful to another's interest.

Hawaiian scholar Davianna Pomaika'i McGregor, who has extensively studied traditional and customary practices in rural communities, has suggested some behavioural factors that should be considered in determining whether practices, in this modern age, are firmly linked to custom. She states:[182]

> These rules of behaviour are tied to cultural beliefs and values regarding the respect of the *'āina* (land), the virtue of sharing and not taking too much, and a wholistic perspective of organisms and ecosystems that emphasises balance and coexistence.

She also notes:[183]

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177 United States v Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 414 U.S. 44, 48 (1976). See also Puyallup Tribe v Department of Game, 391 U.S. 392 (1968); Sohappy v Smith, 302 F. Supp. 899 (D. Or. 1969), aff'd. and remanded, 529 F.2d 570 (9th Cir. 1976); United States v Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1979); Peterson v Christensen, 455 F. Supp. 1095, 1099 (E.D. Wis. 1978); Grand Traverse Band of Chippewa and Ottawa Indians v Director, Michigan Department of Natural Resources, 971 F. Supp. 282, 289 (W.D. Mich. 1995), aff'd. 141 F.3d 635 (6th Cir. 1998), rehrg denied, 1998 U.S. App. LEXIS 13638 (1998), cert. denied, 525 U.S. 1040 (1998).

178 U.S. v Washington, 384 F. Supp. 312, 363-64 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

179 Ibid, at 402.

180 16 U.S.C. § 1361-1421h (2000).

181 Ibid, § 1371(b).

182 McGregor, above note 3, 30 Hawn. J. of Hist. at 16 (1996).

183 Ibid, at 16.

> In communities where traditional Hawaiian customs and practices have continued to be practiced, the 'ohana respects and cares for the surrounding natural resources. They only use and take what is needed. They allow the natural resources to reproduce. They share what is gathered with family and neighbors.

Other factors include: protecting the knowledge that has been passed down from generation to generation; acting with purpose and mindfulness when engaged in the particular activity; respecting the traditional areas of other families and practitioners; and honouring the gods and deities that guard a particular resource.[184]

H. *Impact on Private Property Interests*

In *PASH*, the Hawai'i Supreme Court rejected the developer's argument that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights and result in a judicial taking.[185] The Court summarily disposed of the argument, noting that a judicial decision constitutes an unconstitutional taking of private property if it "involve[s] retroactive alteration of state law such as would constitute an unconstitutional taking of private property"[186] and stating that the argument placed undue reliance on Western understandings of property law "not universally applicable in Hawai'i".[187] The Court also stated that custom and usage have always been part of the State's laws.[188]

The *PASH* Court then turned to the question of whether a "regulatory taking" – a taking that occurs when government application of a law to a particular landowner denies all economically beneficial use of the property without compensation – might result from recognition of traditional and customary rights during the process of obtaining permits to develop land.[189] The *PASH* Court agreed with the developer that the issue was premature since it was impossible to know, at that stage of the case, whether and what types of conditions might be placed by the regulatory agency on development in order to protect customary and traditional rights.[190]

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184 Ibid, at 16-18.

185 PASH, 79 Hawai'i at 451, 903 P.2d at 1272.

186 Ibid (citing Bonelli Cattle Co. v Arizona, 414 U.S. 313, 337 n.2, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973) (Stewart J, dissenting)).

187 Ibid.

188 Ibid.

189 Ibid, at 452, 903 P.2d at 1273.

190 Ibid.

Although the *PASH* case has been criticised as a radical departure from prior Hawai'i law, because of the ripeness doctrine,[191] it can only be challenged in federal Court once it has been applied in a specific factual situation. As one commentator has noted,[192]

> [u]ntil there is some specific permit condition imposed or some denial of a permit based on PASH, or until some specific claimant's individual demand for access is adjudicated, there will likely be reluctance on the part of the U.S. Supreme Court to become involved.

Since the *PASH* decision, few cases have made their way to the Hawai'i Supreme Court relating to customary and traditional rights – *Ka Pa'akai* and *Waiola* specifically deal with the permitting process and neither one has resulted in a federal Court challenge to the Court's customary rights jurisprudence.[193]

Soon after the Hawai'i Supreme Court's decision in *PASH*, calls came from the business and private-property rights sectors of the community to define and regulate customary and traditional rights.[194] In 1997, bills were introduced in the Hawai'i State Legislature that would have regulated customary and traditional rights.[195] Senate Bill 8, for instance, instituted a process of determining and registering all traditional and customary uses exercised on a parcel of land. House Bill 1920, on the other hand, created a declaratory cause of action that could be initiated in circuit Court to "determine the nature and extent of customary and traditional practices in land". Both bills failed, due in large part to opposition from the Native Hawaiian community.

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191 See Paul M Sullivan "Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i" (1998 Summer/Fall) 20 U Haw L Rev 99 at 126-33 for a discussion of federal Court cases in which the argument has been made that the Hawai'i Supreme Courts' decisions in specific cases resulted in judicial taking of property and the resulting federal decisions finding such claims not ripe for review.

192 Ibid, at 161.

193 See M Casey Jarman and Robert RM Verchick, "Beyond the 'Courts of the Conqueror': Balancing Private and Cultural Property Rights under Hawai'i Law" (2003, Spring) 5 Scholar 201 for a discussion of the Ka Pa'akai case on remand to the Land Use Commission and application of the Ka Pa'akai analysis in other proceedings.

194 See, for example, Kenneth R Kupchak "Native-Use Rights to Affect Permits" Pacific Business News (Hawai'i, 16 April 1996) calling for a comprehensive solution and the creation of a Native Rights Commission to determine such rights.

195 See D Kapua'ala Sproat, above note 151, (Summer/Fall 1998) 20 U Haw L Rev at 353 for a description of these legislative efforts and analysis of the bills in relation to the Hawai'i Supreme Court's decisions.

One outcome of these legislative efforts, however, was the establishment of a PASH-Kohanaiki Study Group,[196] which released a report on its deliberations in January 1998. The report surveyed the issues raised by the *PASH* decision from various perspectives including those of landowners/business interests, Native Hawaiian practitioners and government agencies. The landowner/business perspective was that a resolution was needed that would (1) protect and perpetuate traditional rights without diminishing private property owner rights, (2) provide predictability, certainty and finality, and (3) foster stewardship of the land.[197] Specific concerns noted were the impact of the decision on title insurance and development financing, the possible increased regulatory burden on those wishing to develop properties, and the potential liability of landowners for injury to those accessing private property to practise customary and traditional rights. An overarching concern expressed was that the PASH decision had the potential to "undermine the State's investment climate" with resulting negative consequences throughout the State's economy. More than 15 years after the *PASH* decision, however, it does not appear that the concerns and fears expressed by business and private property rights advocates have actually affected real estate transactions or Hawai'i's economy.

V. Custom in Other State Laws

Although it is not possible to do a complete survey of other Hawai'i laws incorporating or protecting Hawaiian custom, several important examples indicate the extent to which custom plays a role in Hawai'i law. These examples include water rights, the protection of Hawaiian human remains or iwi kūpuna, and enactment of a law allowing parents to keep the 'iewe or placenta of a newborn.

A. *Hawaiian Water Rights*[198]

In ancient Hawai'i, water or wai was a procreative force and the physical embodiment of the god Kāne.[199] In addition to defining social and cultural development because of the importance of water to the growth of kalo or taro, the Hawaiian staple plant, how water was shared and managed was literally the basis for law. For growth and to prevent disease, kalo requires constantly

196 See H.R. No. 197, H.D. 1, Regular Session of 1997, Nineteenth State Legislature, State of Hawai'i.

197 PASH-Kohanaiki Study Group Report at 9 (January 1998).

198 For an extended discussion of Hawaiian water rights law see John Castle and Alan Murakami in Melody Kapilialoha MacKenzie (ed) Native Hawaiian Rights Handbook (University of Hawai'i Press, Honolulu, 1991) Chapter 7 ["Handbook"].

199 ES Craighill Handy and Elizabeth Green Handy, Native Planters in Old Hawaii (Bishop Museum Press, Honolulu, 1972) at 64-65.

flowing cool, fresh water. Hawaiians constructed complex systems of 'auwai or irrigation ditches and developed a management system that apportioned water among lo'i kalo or taro fields next to a ditch or stream.[200] After water flowed through the lo'i, it was returned to the 'auwai or stream to flow downstream to the next lo'i and eventually to the sea. On the lo'i banks, kalo farmers grew other crops like banana, sugar cane and yam.[201] This system, which served the ancient Hawaiians well, continues today in rural communities throughout the islands. Kalo is still a staple food for the Hawaiian community and indeed, in the Hawaiian creation story, kalo and Hawaiians share a common ancestor.[202] Thus, kalo is viewed as the older sibling of the Hawaiian people. Kānāwai (relating to water) is the word for law in the Hawaiian language and, as commentators have noted, this term reflects Hawaiian society's[203]

> focus on managing the shared use of water. Hawaiians deemed water and other natural resources a public good. The entire community, regardless of social rank, dutifully respected this principle and did not lightly suffer any violaters.

Hawai'i water law today is a mix of Hawaiian traditional concepts, common law based on those concepts, and constitutional and statutory provisions incorporating those concepts. While it is beyond the scope of this article to examine Hawai'i water law in detail, several general principles – appurtenant water rights, riparian uses, and the public trust nature of water – show the extent to which Hawaiian tradition has been incorporated into State law. In addition, the Hawai'i Water Code contains specific provisions protecting traditional and customary rights.

Early Hawai'i case law recognised appurtenant water rights based on the ancient Hawaiian agricultural system. Through ancient custom, the right to use water for irrigating taro lands became attached or "appurtenant" to the lands. This customary right became a legal right when land titles were awarded[204] with the quantity of water allowed tied to the amount customarily used at and immediately prior to a land award during the Māhele process.[205] The earliest Hawai'i water rights case established this principle. In *Peck v Bailey* (1867),[206]

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200 See Antonio Perry "Hawaiian Water Rights" in Thomas G Thrum (ed) Hawaiian Annual & Almanac for 1913 (1912) at 95 for a description of traditional Hawaiian water usage and management.

201 Handy and Handy, above note 199, at 92-93 (1972).

202 David Malo, Hawaiian Antiquities (Bishop Museum Press, Honolulu, 1903) at 320.

203 D Kapua'ala Sproat and Isaac H Moriwake "Ke Kalo Pa'a o Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy" in C Rechtschaffen and D Antolini (eds) Creative Common Law Strategies for Protecting the Environment (Environment Law Institute, Washington, 2007) at 249.

204 Peck v Bailey, 8 Haw. 658, 661 (1867).

205 Carter v Territory, 24 Haw. 47, 66 (1917); Territory v Gay, 31 Haw. 376, 383 (1930).

206 8 Haw. 658 (1867).

a dispute arose between two landowners within the ahupua'a of Wailuku on Maui, with the plaintiff claiming a superior right based on title derived from the konohiki of the ahupua'a.[207] The Court rejected the claim, stating, "[i]f any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance".[208] Consequently, each party was limited to ancient appurtenant rights to use water for its lands, neither party having any superior rights. Since the *Peck* decision, the doctrine of appurtenant rights has become a basic tenet of Hawai'i water law.[209]

In *McBryde Sugar Co. v Robinson*,[210] the Hawai'i Supreme Court clarified Hawai'i law to hold that waters flowing in natural watercourses belong to the State of Hawai'i. In *McBryde*, the Court looked to the Māhele and its implementing laws to examine what Kamehameha III intended to convey in granting fee simple titles. The Board of Land Commissioners, which was responsible for hearing and determining land claims, adopted certain principles including the principle that the king's prerogatives as head of the nation – his "sovereign prerogatives – could not be conveyed. One of these sovereign prerogatives was "to encourage and even to enforce the usufruct of lands for the common good".[211] The *McBryde* Court reasoned that the right to use water was one of the most important usufructs of land. The principles showed the king's intent to reserve the right to use water to himself as sovereign for the common good. Thus, no right to private ownership of water had been conveyed with any land title grant as a result of the Māhele process.[212] The Court held that the State, as successor to the King, owned all waters flowing in natural watercourses.

In *McBryde*, the Court also pointed to section 7 of the Kuleana Act of 1850, which guarantees the right to "drinking water and running water". The Court said that the term "running water" must have meant water flowing in natural watercourses, since artificial watercourses were exempted from the statute. Pointing to the influence of the missionaries from Massachusetts, the Court

207 Ibid, at 659.

208 Ibid, at 661.

209 Wells A Hutchins The Hawaiian System of Water Rights (US Dept of Agriculture and the Board of Water Supply, City and County of Honolulu, Honolulu, 1946) at 103.

210 54 Haw. 174, *504 P.2d 1330 (1975), affm'd on rehearing*.

211 Ibid, at 186, 504 P.2d at 1338, quoting from 2 Revised Laws of Hawaii, 1925 app. at 2124, 2128 (1925).

212 Ibid, at 187, 504 P.2d at 1339.

found parallels to the English common law doctrine of riparianism, which Massachusetts had adopted.[213] Consequently, the Court held that a landowner adjoining a natural watercourse had riparian water rights.

Subsequently, the Hawai'i Supreme Court in *Reppun v Board of Water Supply*[214] reaffirmed the doctrine, specifically highlighting the needs of Hawaiian kalo farmers and the shared use of water resources in traditional Hawaiian society:[215]

> First, the doctrine is consistent with the needs of native commoners at the time of the law's passage. Taro, the predominant agricultural crop, grew best where a steady flow of running water, most of which could be subsequently utilised by lower riparian users, occurred; the cultivation of taro took place principally upon riparian lands; and grants to commoners were restricted to lands they had in fact cultivated. Second, the principles underlying the doctrine are consistent with those that appear to pervade the native system of water allocation and preexisting civil law inasmuch as: "title" to the water was not equated with the right to use; each person's right to use was a "correlative" nature; and rights to use were predicated upon beneficial application of the water to the land.

In 1978, the Hawai'i State Constitution was amended to expressly declare that "[a]ll public natural resources are held in trust by the State for the benefit of its people".[216] Another amendment reiterated the State's "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people".[217] This amendment also provided for the creation of a water resources agency that would, among other things, "establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources".[218]

213 The cases cited by the Court indicated that natural water courses were publici juris; meaning that such waters were public and common to the extent that all who had a right of access could make reasonable use of them. Ibid, at 186-87, 504 P.2d at 1338-1339.

214 65 Haw. 531, 656 P.2d 57 (1982), cert. denied, 471 U.S. 1014 (1984).

215 Ibid, at 545, 656 P.2d at 67 (1982).

216 Haw. Const. art. XI, § 1.

217 Haw. Const. art. XI, § 7.

218 Ibid.

In 1987, the State Legislature adopted the State Water Code. The Code ensures that "traditional and customary rights of ahupua'a tenants ... shall not be abridged or denied" in implementing its provisions and states that:[219]

> such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

In a landmark water rights decision interpreting the State Constitution and the Water Code, the Hawai'i Supreme Court gave substance to the public trust doctrine in Hawai'i.[220] Although the decision contains many significant and groundbreaking determinations, for our purposes, the most relevant is the Court's recognition that "Native Hawaiian and traditional and customary rights" are public trust purposes.[221]

B. *Protection of Ancestral Remains*[222]

Values and customs related to death "are deeply ingrained in Hawaiian culture, calling for utmost respect and reverence".[223] For traditional Hawaiians, the bones and the spirit of a person are connected and the spirit remains near the bones or iwi following death. The burial area is a sacred place, particularly because the life force or mana of the deceased person is infused into the place of burial. The mana of the deceased is imparted to the ahupua'a and eventually to the entire island. The iwi of the deceased and the burial site were so sacred that if either was disturbed, the ability of the spirit to join the 'aumākua or ancestors in eternity was in jeopardy. This then could result in injury and spiritual trauma to the living descendants of the deceased person.

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219 Haw. Rev. Stat. § 174C-101(c). Hīhīwai are "endemic grainy snails" eaten by Native Hawaiians; 'ōpae is the "general name shrimp"; 'o'opu is the "general name for certain families of fish ... some in salt water near the shore, others in fresh water, and some said to be in either fresh or salt water"; limu is a "general name for all kinds of plants living under water, both fresh and salt, also algae growing in any damp place in the air, as on the ground, on rocks, and on other plants"; aho means "line, cord, lashing" (Hawaiian Dictionary). Section 174C-101(d) also provides that the "appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter."

220 See, generally, Sproat and Moriwake, above note 203, for a discussion of the public trust doctrine in Hawai'i water cases.

221 In re Water Use Permit Applications, 94 Haw. 97, 137 n.34, 9 P.3d 409, 449 n.34 (2000).

222 This section is based on information from Chapter 13 in Handbook, above note 198, written by Edward Halealoha Ayau.

223 Ibid, at 245. See MK Pukui, EW Haerting, C Lee Nānā I Ke Kumu (Look to the Source) Vol. I (Hui Hanai, Honolulu, 1972) at 115-118, 195-196 for discussion of Hawaiian concepts of death and treatment of human remains.

In 1988, during the construction of a large resort on the island of Maui near Honokahua Bay, Hawaiian remains were removed to make room for the new hotel. Although there certainly had been other instances where remains had been discovered, in the past, iwi kūpuna or ancestral remains had been dug up and historic sites paved over for development with impunity. At Honokahua, however, when local news accounts began to report the exhumation of more than 1,100 skeletal remains, Hawaiians were outraged by the desecration.[224] They mobilised and held a 24-hour vigil at the state capitol. Ultimately, the developer agreed to move the hotel inland, the disturbed 'iwi kūpuna were reinterred, and the burial area was set apart.[225]

The activities at Honokahua sparked a demand for legislative protection for Hawaiian burial sites. In 1990, the Hawai'i State legislature passed a burials law giving Hawaiian burial sites – especially those with large numbers of remains – additional protection.[226] The law establishes island burial councils for each of the major islands, with representatives from both the Native Hawaiian community and large landowner interests, with Hawaiian interests constituting a majority on the councils.[227] The councils assist the State Historic Preservation Division (SHPD) with the inventory and identification of unmarked prehistoric and historic Hawaiian burial sites. The councils also make recommendations on the treatment and protection of iwi kūpuna.

A major role of the councils is to "determine the preservation or relocation of previously identified native Hawaiian burial sites".[228] The law states that "[a]ll burial sites are significant and shall be preserved in place until compliance with this section is met…".[229] The law also establishes criteria that the councils must consider, including giving higher priority to in situ preservation to[230]

> areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or that are within a context of historic properties, or have known lineal descendants[.]

Before a State project affecting unmarked prehistoric or historic Hawaiian burials begins, SHPD must be notified for review and comment. Similarly, for projects located on private property, before any agency of the State or its political subdivisions approves a project involving a permit, licence, land

224 Handbook, above note 198, at 245.

225 Kūnani Nihipali "Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality" (2002, Spring) 34 Ariz St LJ 27.

226 Act 306, Haw. Sess. Laws. 1990 (codified at Haw. Rev. Stat. Chap. 6-E).

227 Haw. Rev. Stat. § 6E-43.5.

228 Ibid, § 6E-43.5(f)(1).

229 Ibid, § 6E-43(b).

230 Ibid.

use change or other entitlement for a use that may affect burials, the agency must advise SHPD.[231] If an archaeological inventory survey reveals evidence of burials on the relevant property, the appropriate island burial council has jurisdiction to determine whether to preserve in place or relocate the remains.

If Hawaiian remains are "inadvertently" discovered during construction, SHPD has jurisdiction to decide whether to preserve in situ or relocate; in making that decision, SHPD must use the same criteria as the councils.[232] In either instance, a mitigation plan will be developed by the SHPD or with its concurrence. Preservation in place should be the mitigation plan if there is no threat to the iwi. The landowner or developer is usually responsible for executing the mitigation plan.[233]

On the other hand, if removal is necessary due to imminent harm to the iwi, burial council members are notified and allowed to oversee the process. SHPD determines the place of relocation after consulting with the property owner, lineal descendants and the council. Lineal and cultural descendants may perform traditional ceremonies during relocation of the iwi.[234]

The burials law defines "burial site" to address concerns that human remains should not be classified as ordinary property and that the area surrounding a burial is sacred.[235] Thus, burial sites are "unique class[es] of historic property". Moreover, under the law, the State of Hawai'i holds title to known Hawaiian burial sites "in trust for preservation or disposition by ... [Native Hawaiian] descendants".[236] Finally, the State cannot transfer a burial site without consulting the appropriate island burial council.[237]

The success of the burial law depends on how well SHPD implements the law and whether all parties – particularly developers and landowners – cooperate. Indeed, with the large number of development activities in Hawai'i, the law can only be successful if developers and landowners are responsive to the complex cultural, spiritual and legal issues involved. Recent controversies – in urban Honolulu and on the island of Kaua'i – indicate that the process envisioned by the law may not be working. Several lawsuits are currently pending in State Courts dealing with the interpretation of the law in an urban setting where permits have been granted for development, allegedly without

231 Ibid, § 6E-42.
232 Ibid, § 6E-43.6(c)(3).
233 Ibid, § 6E-43.6(e).
234 Ibid, § 6E-43.6(f).
235 Ibid, § 6E-2.
236 Ibid, § 6E-7(c).
237 Ibid, § 6E-7(d).

following the careful review process established in the law.[238] This means, for instance, that in one case where remains of over 60 kūpuna have been discovered, they are classified as "inadvertently discovered" and jurisdiction over whether to preserve in place or remove to another location has fallen to the SHPD rather than the O'ahu Island Burials Council.[239]

C. *Protection for Customs Related to Birth*

Just as customary practices related to death are culturally and spiritually significant to Native Hawaiians, so too are those relating to birth. The proper care of both the piko or umbilical cord, and 'iewe or placenta, of a newborn increases the child's health and well-being throughout its life. Important rituals associated with both the piko and 'iewe connected a child to its homeland. The piko would be carefully guarded and then placed in a special reserved place. Hawaiian scholar Mary Kawena Pukui stated,[240]

> In every district on every island were places, usually stones, especially reserved for the *piko*. *Wailoa* was one on the Big Island ... another was *Mokuola*. *Ola* means 'life' and *loa* means 'long'. Mothers took the cords to stones with names like these so their babies would live long, healthy lives.

Traditionally, Hawaiians cleaned the 'iewe of blood to ensure that the child's eyes would not be weak or sore. The 'iewe was later buried, usually under a tree, to keep the child connected to its home and to prevent the child's spirit from wandering homeless or hungry after death.[241]

In 2005, the State of Hawai'i Department of Health began enforcing a policy that classified the 'iewe as infectious waste. Previously, hospitals and doctors had given the 'iewe to a mother upon request. A Native Hawaiian couple filed a lawsuit in the US District Court for the District of Hawai'i contesting the policy as a violation the US Constitution's provision guaranteeing religious

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238 See, for example, Kaleikini v Thielen, 124 Hawai'i 1, 237 P.3d 1067 (2010); Vicki Viotti "Wal-Mart Asked to Delay Store Opening" Honolulu Advertiser (Hawai'i, 3 October 2004) <http://the.honoluluadvertiser.com/article/2004/Oct/03/ln/ln15a.html> (last visited 5 November 2011); see Charles Kauluwehi Maxwell "Kūkākūkā: Apply the Law to Protect Naue iwi kūpuna" Ka Wai Ola o OHA (Hawai'i, June 2009) <www.oha.org/kwo/loa/2009/06/story13.php> (last visited 5 November 2011) for discussion of a recent controversy on Kaua'i.

239 For a discussion on the Hawai'i burials law and controversies surrounding its implementation in urban Honolulu, see Rona Bolante "Bones of Contention" Honolulu Magazine (Hawai'i, November 2007) <www.honolulumagazine.com/Honolulu-Magazine/November-2007/Bones-of-Contention/> (last visited 5 November 2011).

240 *Nānā I Ke Kumu* Vol. I, above note 223, at 184.

241 Ibid.

freedom and of Hawaiian traditional and customary practices.[242] Once the mother had given birth, the federal Court ordered the 'iewe to be frozen and stored while the suit was pending. Subsequently, the 'iewe disappeared from the hospital and the Court dismissed the lawsuit.[243]

Native Hawaiian families then sought relief through the State Legislature and, in 2006, the Legislature passed and Governor signed a law that allows a hospital to release the 'iewe to the mother or her designee after a negative finding of infectious or hazardous disease.[244] A draft of the bill stated that "the State has the obligation to assure that religious and cultural beliefs and practices are not impeded" without a strong reason.[245] The final committee reviewing the bill noted that "the rich ethnic and cultural practices of Native Hawaiian traditions are essential to sustaining the Hawaiian culture, and need protection".[246] According to news reports, no other US state has laws addressing the cultural need to take placentas from hospitals.[247]

VI. Conclusion – An Oli Aloha

In Hawai'i, state law encourages legislators, judges and policy-makers to apply the "Aloha Spirit" by providing:[248]

> In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district Courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit."

242 *N.S. and E.K.N. v State of Hawai'i*, U.S. D. Ct. for the District of Hawaii, Civ. No. 05-00405 HG, Complaint (24 June 2005).

243 Ibid, Minute Order (5 August 2005).

244 Act 12, Haw. Sess. Laws (2006).

245 Twenty-Third Legislature, State of Hawai'i, H.B. No. 2057 (20 January 2006).

246 Twenty-Third Legislature, State of Hawai'i, Senate Comm. on Health, Standing Comm. Report No. 3185 on H.B. No. 2057, H.D. 2 (31 March 2006). The Committee also noted that many other ethnic groups in Hawai'i, including Filipinos, Chinese and Japanese, also have practices that require burial of the placenta to protect the health of the child.

247 Tara Godvin "Hawaiians Await Bill on Access to Placenta" Honolulu Star-Bulletin (Hawai'i, 17 April 2006) <http://starbulletin.com/2006/04/17/news/story01.html> (last visited 5 November 2011).

248 Haw. Rev. Stat. § 5.75(b) (2008).

Recognising that the aloha spirit was "the working philosophy of native Hawaiians" which was presented as a gift to the general community, Hawai'i law defines aloha as "mutual regard and affection" with "no obligation in return" and "the essence of relationships in which each person is important to every other person for collective existence".[249]

The *PASH* Court specifically cited this provision in rejecting an approach reflecting an "unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, which can also be successfully incorporated in the context of our current culture".[250] Subsequently, the Hawai'i State Legislature, in enacting a law that broadened the requirements of an environmental impact statement to include impacts on the cultural practices of the community, recognised that "the native Hawaiian culture plays a vital role" in the preservation of the "aloha spirit" and that:[251]

> the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture.

Hawai'i's unique history and culture have resulted in a modern society renowned for its warmth and generosity of spirit. That spirit finds its roots in traditional Hawaiian culture and it continues to infuse island life today, in part because of Hawai'i's long-standing recognition and protection for Hawaiian tradition and custom. Thus, I close this paper with the words from the Oli Aloha as expressed in Hawai'i state law:[252]

> Akahai, meaning kindness to be expressed with tenderness;
> Lōkahi, meaning unity, to be expressed with harmony;
> 'Olu'olu, meaning agreeable, to be expressed with pleasantness;
> Ha'aha'a, meaning humility, to be expressed with modesty;
> Ahonui, meaning patience, to be expressed with perseverance.

'Ano 'ai, 'ano 'ai, me ke aloha. Aloha ē, aloha ē, aloha ē.

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249 Haw. Rev. Stat. § 5.75(a) (2008). The law incorporates the words to an Oli Aloha, or chant of Aloha, composed by Pilahi Paki, a Hawaiian chanter, composer and writer. The oli assigns important Hawaiian cultural values to each of the letters of Aloha.

250 PASH, 79 Hawai'i at 450, 903 P.2d at 1271, n. 44.

251 Act 50, Haw. Sess. Laws (2000); see Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084, n. 28 (2000).

252 Haw. Rev. Stat. § 5.75(a) (2008).